Filed 4/24/19 P. v. Chavez CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOSEY CHAVEZ, Defendant and Appellant.	B291460 (Los Angeles County Super. Ct. No. KA114480)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mike Camacho, Judge. Affirmed.

Fay Arfa for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, Thomas C. Hsieh, Deputy Attorney General, for Plaintiff and Respondent.

Josey Chavez (defendant) worked as a certified nurse's assistant caring for elderly residents of the Mount San Antonio Gardens retirement community (the Gardens). One of the residents under defendant's care was Marilyn Hamilton, a 91-year-old vision- and hearing-impaired Alzheimer's patient. Three of defendant's colleagues saw defendant mistreat Hamilton on several occasions by putting a towel in her mouth and putting a towel or pillow over her face. A jury found defendant guilty of misdemeanor elder abuse. We consider whether the conviction must be overturned on statute of limitations grounds, whether the trial court was required to instruct the jurors they must all agree as to which specific incident or incidents supported conviction, and whether asserted prosecutorial misconduct during closing argument requires reversal.

I. BACKGROUND

A. The Offense Conduct

The Gardens is a "continuing care retirement community" with facilities for independent living as well as facilities providing 24-hour skilled nursing and memory care. Hamilton was a long-term resident who "moved through different levels of care over the years," but by July 2016 required "nursing care around the clock." She had "minimal" vision and hearing, and she suffered from Alzheimer's disease. She did not appear to understand what was happening around her most of the time and had difficulty communicating her needs; she would repeat "help me" for hours at a time and sometimes screamed and yelled.

Hamilton lived in an area of the Gardens called Taylor Villa. Defendant was one of the nurses assigned to the unit in

which Hamilton lived. Defendant had worked as a certified nurse's assistant for more than 10 years, all at the Gardens.

Lamia Elmansouri is a registered nurse who worked "back and forth" between Taylor Villa and a similar housing unit. In mid-July 2016, Elmansouri asked defendant to help her tend to Hamilton. Defendant entered Hamilton's room while Elmansouri finished a task at a nurses' station outside. When Elmansouri joined defendant, she saw a towel over Hamilton's face. According to Elmansouri, defendant said she covered Hamilton's face to "muffle" Hamilton's screams. Elmansouri told defendant to "move" or "lower" the towel, and defendant complied. Elmansouri did not immediately report defendant's use of the towel on Hamilton to the Gardens administrators because Elmansouri had "never seen any wrongdoing from [defendant] before" and "didn't think it through."

On a separate occasion, also in mid-July 2016, defendant asked Andrea Aymar, a certified nurse's assistant who had worked at the Gardens for a number of years (but who was new to working in Taylor Villa), to help prepare Hamilton for bed. Defendant was already in Hamilton's room when Aymar entered, and Hamilton was yelling "help, help, help" as she "always" did. According to Aymar, defendant put a washcloth into Hamilton's mouth, defendant said "[Hamilton was] sick and [defendant did not] want to get sick," and defendant then placed a pillow over Hamilton's face. Aymar was troubled and moved the pillow "a little bit." Defendant put the pillow back on Hamilton's face and gave Aymar a "nasty look."

Aymar waited about 10 days to report the incident.[1] She worried her supervisors would not believe her and felt Hamilton was not in immediate danger. After Aymar came forward, administrators at the Gardens suspended defendant, conducted an internal investigation, contacted law enforcement, and ultimately fired defendant.

Friederike Wolf was the Gardens' Chief Health Officer at the time and she participated in the internal investigation, including defendant's interview. According to Wolf, defendant initially denied mistreating Hamilton, but, "when it wasn't negotiable anymore, [defendant] said, 'Well, I wasn't the only one. You better start looking at everybody else.'"

B. The Elder Abuse Charges and the Defense Mounted at Trial

On September 26, 2017, over a year after the aforementioned July 2016 incidents described by Elmansouri and Aymar, the Attorney General filed a three-count information charging defendant with Elder Abuse (Pen. Code,[2] § 368, subd. (b)(1)), Battery on an Elder (§ 243.25), and Simple Battery (§§ 242, 243, subd. (a)). The battery charges were dismissed by

---

[1] In the meantime, Aymar discussed the incident with colleagues, including via a text message exchange with a nurse's assistant at the Gardens, Lucyetta Sitompul, who testified at trial as a defense witness. In the messages, Aymar asked if Sitompul had seen defendant put a pillow over Hamilton's face or a towel inside Hamilton's mouth. Sitompul replied, "Did you see something?" Aymar replied, "Yes."

[2] Undesignated statutory references that follow are to the Penal Code.

the prosecution during trial, leaving the elder abuse charge as the only issue requiring resolution by the jury.

Defendant presented a defense case during trial and called Sitompul, the other certified nurse's assistant working at the Gardens, as a defense witness. Sitompul's testimony, however, was unfavorable for the defense in significant respects. Sitompul admitted she saw defendant mistreat Hamilton, also in mid-July 2016. Specifically, Sitompul observed defendant put "a small towel" in Hamilton's mouth, and when Sitompul removed it and said "[d]on't do that," defendant placed the towel over Hamilton's face while remarking "there were lots of bacteria[ ] [coming] out from [Hamilton's] mouth."[3] More favorably for the defense, Sitompul did testify she told the police that she did not think defendant was trying to hurt Hamilton, and Sitompul also denied witnessing defendant abuse Hamilton on two other occasions.

After calling Sitompul as a witness, defendant testified in her own defense, offering a blanket denial of any wrongdoing. Defendant allowed that she sometimes put a towel on Hamilton's chest because she "would salivate a lot" but defendant claimed, contrary to the testimony from Aymar, Sitompul, and Elmansouri, that she never put a washcloth inside Hamilton's mouth nor did she put a towel or a pillow over Hamilton's face.[4]

---

[3] When Sitompul was given an opportunity to refresh her recollection with a police officer's report summarizing her earlier statements, she modified her account: "[Defendant] placed [a] pillow, and I took it away, but . . . Hamilton was still screaming, and [defendant] placed [a] small towel into the mouth . . . ."

[4] As to the incident described by Aymar, defendant went further, asserting she had not even handled any washcloths or

Defendant also denied telling Wolf she "wasn't the only one" who mistreated residents. Defendant admitted (1) she had filed a civil suit against the Gardens after getting fired and (2) she knew that if the criminal allegations against her turned out to be true, she could "be out a lot of money" she was seeking via the civil suit.

C. Verdict and Sentence

The jury found defendant not guilty of felony elder abuse but guilty of the lesser included offense misdemeanor elder abuse (§ 368, subd. (c)). (Felony elder abuse requires, among other things, proof that a defendant's abuse of an elder is "likely to produce great bodily harm or death" (§ 368, subd. (b)(1)) while misdemeanor elder abuse has no such proof requirement. (§ 368, subd. (c).)) The trial court sentenced defendant to summary probation for three years, including conditions that she serve 60 days in county jail and perform 60 days of community labor.

II. DISCUSSION

Defendant advances three arguments for reversal, none of which is persuasive. She contends her prosecution for misdemeanor elder abuse should have been barred in light of the one-year limitations period that applies to most misdemeanors, but a special five-year statute of limitations governs prosecution of the charged elder abuse offense. Defendant argues the trial court should have sua sponte instructed the jury that they must unanimously agree on the factual scenario giving rise to criminal liability (given the multiple instances of mistreatment related by

---

pillows while Aymar was in the room with defendant and Hamilton.

Elmansouri, Aymar and Sitompul), but the absence of a unanimity instruction does not warrant reversal because defendant's defense to all the mistreatment incidents (a blanket denial of wrongdoing) was the same and it is inconceivable that a juror would have found defendant credible in her denial of one instance of abuse but not another. Defendant also alleges there was prosecutorial misconduct during closing argument (we describe the alleged misconduct in greater detail *post*), but the claim is forfeited and her fallback assertion of ineffective assistance of counsel fails.

A. The Five-Year Statute of Limitations Set Forth in Section 801.6 Applies to Misdemeanor Violations of Section 368

Section 802, subdivision (a) establishes a one-year statute of limitations for most misdemeanor crimes: "[P]rosecution for an offense not punishable by death or imprisonment in the state prison or pursuant to subdivision (h) of Section 1170[5] shall be commenced within one year after commission of the offense." Section 801.6, however, establishes a five-year limitations period for elder abuse prosecutions under section 368:
"Notwithstanding any other limitation of time described in this chapter, prosecution for any offense proscribed by Section 368, except for a violation of any provision of law proscribing theft or embezzlement, or for the failure of a mandated reporter to report an incident under Section 11166 known or reasonably suspected by the mandated reporter to be sexual assault as defined in

---

[5] Section 1170, subdivision (h) provides for imprisonment in a county jail for periods longer than one year for certain felonies.

Section 11165.1, may be filed at any time within five years from the date of occurrence of such offense."

In the face of a straightforward application of section 801.6 that establishes defendant's prosecution was timely, defendant contends that "[i]f the Legislature had wanted Penal Code section 801.6 to apply to misdemeanors, the Legislature would have amended Penal Code section 802 to include a five[-]year limitations period for the prosecution of a violation of Penal Code section 368[,] subdivision (c)." The Legislature, in effect, did precisely that. The first clause of section 801.6 states the five-year limitations period applies "[n]otwithstanding any other limitation of time described in this chapter"—a chapter that includes section 802.[6] There was thus no need to amend section 802 itself.

---

[6] The legislative history of section 801.6 confirms the intention to override section 802's one-year statute of limitations for misdemeanor elder abuse charges. The Legislative Counsel's Digest explained, for example: "Existing law provides for limitations on time concerning when a criminal complaint may be filed, based on the seriousness of the charged offense and how long ago the charged offense allegedly occurred. Generally, offenses which may be punished by imprisonment in the state prison must be charged within 3 years of the commission of the offense, offenses which involve a breach of fiduciary duty or fraud must be charged within 4 years, *and any offense which is not punished by state imprisonment must be charged within one year*. [¶] This bill would provide that, . . . with regard to crimes associated with elder abuse and neglect, . . . prosecutions for offenses not involving theft or embezzlement may be brought at any time within 5 years of the commission of the offense." (Legis. Counsel's Dig., Assem. Bill No. 190 (1997-1998 Reg. Sess.), italics added.)

B. The Jury Instruction Given on Unanimity Does Not Compel Reversal

"[C]ases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*).) "'[E]ven absent a request, the court should give [a unanimity] instruction "where the circumstances of the case so dictate."' [Citation.]" (*People v. Covarrubias* (2016) 1 Cal.5th 838, 877.) "This requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' [Citation.]" (*Russo*, *supra*, at p. 1132.)

When deciding whether to give a unanimity instruction, a trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, the court should give the unanimity instruction. (*Russo*, *supra*, 25 Cal.4th at p. 1135.) "There . . . is no need for a unanimity instruction if the defendant offers the same defense or defenses to the various acts constituting the charged crime." (*People v. Jennings* (2010) 50 Cal.4th 616, 679; see also *People v. Hernandez* (2013) 217 Cal.App.4th 559, 577 [describing the absence of a unanimity instruction as "harmless error" where a defendant "offer[s] the same defense to all criminal acts and 'the

jury's verdict implies that it did not believe the only defense offered'"] (*Hernandez*).)

Here, the trial court gave a modified version of CALCRIM No. 3500[7]: "The defendant is charged in Count 1 with elder abuse likely to produce great bodily harm or death in violation of Penal Code section 368(b)(1). Elder abuse in violation of Penal Code section 368(c) is a lesser offense. [¶] The People have presented evidence of more than one theory to prove that the defendant committed these offenses. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed the offense based on at least one theory and you all agree on the same theory." The trial court explained its reasoning for giving the instruction in this modified form, reasoning to which both the prosecution and defendant assented: "I have prepared a unanimity instruction in light of the People's alternative theories of liability for Count 1. By alternative theories, I mean[ ] the Defendant engaging in conduct that would obviously result[ ] in unjustifiable mental suffering or physical pain to . . . Hamilton or, in the alternative, plac[ing] her in a situation when her health or safety could be in danger. Those are alternative theories and I think unanimity is appropriate."

---

[7] CALCRIM No. 3500 provides as follows: "The defendant is charged with _____ <insert description of alleged offense> [in Count _____] [sometime during the period of _____ to _____]. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed."

Although the trial court did instruct the jurors that they must unanimously agree on the legal theory of criminal liability, the trial court did not instruct the jurors that they must also unanimously agree on the facts that supported liability under the agreed-upon theory—i.e., which of the three incidents related by the witnesses at trial constituted elder abuse. Given the defense proffered at trial, however, the absence of such a fact-based unanimity instruction cannot be grounds for reversal.

In essence, the defense at trial was that Aymar, Sitompul, Elmansouri, and Wolf all testified falsely. During closing argument, the defense argued "Aymar . . . did not want to have [defendant] work at that facility anymore, and . . . [Aymar] fabricated evidence and sought out any other employees at that establishment to get her on board to supplement her accusations and that she recruited basically the enemies of [defendant, i.e., Sitompul and Elmansouri] to be able to do that." Defense counsel suggested the three witnesses were motivated to lie because "it appears everybody hates [defendant] or strongly dislikes her at work." Defense counsel further contended that, after defendant's colleagues purportedly lied to supervisors and law enforcement, Wolf fabricated a confession because "she's the Chief Health Officer of that facility who's looking to avoid liability, looking to not have an $18,000 fine against the facility and that's why she fabricated that statement that [defendant] allegedly made." These arguments were all consistent with defendant's blanket denial of any wrongdoing during her own testimony.

Perhaps a fact-based unanimity instruction would have been warranted if defendant had argued the witnesses misperceived her conduct with Hamilton or each decided independently to lie. But that was not the defense. Instead,

defendant urged the jury to evaluate her colleagues' testimony as part of a coordinated campaign and made the relative assessment of defendant's credibility as compared to her colleagues an all-or-nothing issue. Based on the defense offered at trial, the jury could not help but reach a unanimous conclusion—one way or the other—regarding Aymar, Sitompul, Elmansouri, and Wolf's credibility. (See, e.g., *Hernandez*, *supra*, 217 Cal.App.4th at p. 573 ["[B]ecause the defendant offered the same defense to both acts, the guilty verdict signified that the jury rejected his defense in toto"].) That establishes reversal is not warranted for the alleged instructional error.

C. Defendant's Prosecutorial Misconduct Claim Is Forfeited and Her Ineffective Assistance of Counsel Claim Fails

During closing argument, "'it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements [citation].' [Citation.] Improper comments violate the federal Constitution when they constitute a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. [Citation.] Improper comments falling short of this test nevertheless constitute misconduct under state law if they involve use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. [Citation.]" (*People v. Cortez* (2016) 63 Cal.4th 101, 130.) For reasons we now explain, we reject defendant's contention that her conviction must be reversed because the prosecution, as she sees it, asked

the jury to view the evidence through Hamilton's eyes, a so-called "Golden Rule" argument, and misstated the reasonable doubt standard.

1. Forfeiture

As defendant concedes, there was no contemporaneous objection to the prosecution's closing argument on the grounds now asserted. The misconduct claims raised on appeal are therefore forfeited.[8] (*People v. Winbush* (2017) 2 Cal.5th 402, 482; *People v. Williams* (2013) 56 Cal.4th 630, 671-672.) Defendant seeks to evade the consequences of the forfeiture by perfunctorily arguing trial counsel's failure to object constitutes ineffective assistance of counsel. We will assume the appellate briefing is sufficient to preserve the ineffective assistance of counsel claim.

"'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 694[ ] [(*Strickland*)]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217[ ].)'" (*People v. Carter* (2005) 36 Cal.4th 1114, 1189.) "Defendant . . . bears the burden of establishing constitutionally inadequate assistance of counsel." (*Ibid.*) "Failure to raise a meritless objection is not ineffective assistance of counsel." (*People v. Bradley* (2012) 208 Cal.App.4th 64, 90.)

---

[8] Assuming we have discretion to excuse the forfeiture, we decline to exercise it.

2. Comments regarding Hamilton's suffering

The prosecution told the jury it would "go through both" legal theories on which it contended the jury could convict defendant of felony elder abuse "element by element." Beginning first with the "willful infliction of pain or suffering" theory, the prosecution argued: "First element, the defendant willfully inflicted unjustifiable physical pain or mental suffering on Marilyn Hamilton. [¶] So let's think about that for a second. You heard testimony that the defendant at different points in time in the presence of different witnesses stuffed a pillow in Marilyn Hamilton's face, jammed a washcloth into her mouth to the length of about the corner of the washcloth to a length of about four inches. You heard testimony that Marilyn Hamilton was legally blind so she couldn't see what was going on but all of a sudden a pillow drops on her face, cuts off her breathing through her mouth and nose and then to add insult to injury, a washcloth suddenly enters her mouth. She can't see anything but all of a sudden both of the passage[ ]ways that she relies on to breath[e] life-giving air are cut off. I would suggest to you that that is almost the definition of mental suffering if not unjustifiable pain. So that's Element One. Let's put a check mark in there."

Defendant contends it was improper for the prosecution to ask the jury to consider Hamilton's suffering. She relies on authority forbidding "Golden Rule" arguments. (See, e.g., *People v. Vance* (2010) 188 Cal.App.4th 1182, 1188 ["There is a tactic of advocacy, universally condemned across the nation, commonly known as 'The Golden Rule' argument. In its criminal variation, a prosecutor invites the jury to put itself in the victim's position and imagine what the victim experienced. This is misconduct,

because it is a blatant appeal to the jury's natural sympathy for the victim"].)

The authority is inapposite. The prosecution did not ask the jurors to put themselves or their loved ones in Hamilton's position. The prosecution's references to Hamilton's visual impairment and the blocking of her airways were relevant to how she would have been affected by defendant's conduct. And the effect on Hamilton—specifically, whether it amounted to suffering—was an element of the charged offense. The prosecution's argument that this element was satisfied, without more, was not an appeal to the jurors' sympathy, and defendant's trial attorney was not constitutionally ineffective for forgoing a meritless objection.

3. Comments regarding reasonable doubt

a. additional background

Defendant highlights several excerpts of the prosecution's closing argument that she contends were improper comments on the reasonable doubt standard. The prosecution initially distinguished proof beyond a reasonable doubt from proof "beyond all possible doubt" and proof "beyond a shadow of a doubt," which was proper, and then engaged in an extended discussion prefaced by the following: "The law says the test is reasonable doubt. Have the People proven the case beyond a reasonable doubt? What's reasonable and what's not? That's where your common sense and experience kick in. [¶] A few simple examples."

The prosecution's first example involved a student's excuse that a dog ate their homework: "A student comes [ ]to his teacher and is explaining why he didn't do his homework and he says the

dog ate it. Well, common sense tells you dogs don't eat homework. Kids lose their homework, forget to do their homework, do the homework badly and are embarrassed about it or just haven't finished it yet but dogs don't eat it."

The next example involved Los Angeles-area traffic: "I got stuck in traffic driving from Los Angeles to Pomona and that's why I was three hours late. Well, most of us have some experience driving around Southern California. We have a general idea of how long it takes to get from point A to point B and yes, we all know about traffic. We all know that traffic can cause delays. And probably most, if not all of us, have a general idea of how long it takes to drive from Los Angeles to Pomona under various conditions. But if it takes three hours to make a drive that generally takes [an] hour, hour and a half, maybe a little more than that, the person being three hours late kind of tends to suggest that maybe the person left late and so maybe the traffic wasn't really the reason why he was late."

The third example also involved traffic: "Or here's an opposite extreme. The witness testifies I left Pomona at 8:00 a.m. on a weekday morning and arrived in Downtown Los Angeles at 8:15 a.m. How believable is that? If a witness testified to that he'd be saying in effect he traveled 30 odd miles in 15 minutes. That means he was traveling about a hundred—120 miles an hour. Even in light traffic or no traffic, what are the chances of that?"

A fourth example involved the significance of what the prosecution referred to as "trivial detail[s]": "Here's maybe a more subtle one. This is one I actually saw come up when I was a young law student. I was observing a trial and there was—in that case it was a liquor store robbery and there was testimony

from one witness that he saw the liquor store robber pull out a black gun with silver trim. And then later found at the scene there was a silver gun with black trim. And the defense attorney in that particular case made a big deal of the fact that this witness had incorrectly described the color of the gun and, therefore, should not be believed. And the question is does that—does a difference on an insignificant or a trivial detail such as that really make a big difference? Obviously that's not this case, but I would submit on the facts of that case with the black trim or with the silver trim probably doesn't matter."

Finally, and in the same vein, the prosecution explained its view of the significance of "unanswered questions": "Now, sometimes when juries go into the jury room, one juror will say I have some unanswered questions about what happened here and as long as I have those questions, I have a reasonable doubt. That's not the law either. As the instructions indicate, the People have the burden of proving—the burden of proving that to convict [defendant], you have to find that the People have proven beyond a reasonable doubt that she committed the crime that she is charged with. But we do not have to answer every possible question that may have occurred to you or could occur to someone. It would be nice if we lived in a world like the one you sometimes see on T.V. where forensic analysts gather fingerprints, footprints, holograms, D.N.A. and psychological profiles for everyone who met the victim or came within five miles of the victim. Plug it all into a computer and presto, out pops an all seeing, all knowing narrator with a detailed report explaining what every suspect did or didn't do, what they did, whether they did it or didn't do it, where they were when the

crime went down and what they ate for breakfast, lunch and dinner that day."

Summarizing these remarks, the prosecution explained, "We take our evidence as we find it. We listen to what the witnesses have to say. We weigh their stories and we ask ourselves not has every question I might have been answered but do I know enough? Have I heard enough? Have I seen enough to decide the truly important facts in this case and the bottom line question of the defendant's guilt beyond a reasonable doubt? [¶] So the question then becomes how do you separate the really important facts, the ones you really need to decide the case from the trivial or unimportant or nitty picky details [like] was the gun black on silver or silver on black? [¶] And the answer is you look at a second set of instructions on what we call the elements of the crime. What are elements? Elements are facts that need to be proven beyond a reasonable doubt before you can find the defendant guilty of a particular crime."

b. analysis

Defendant believes the prosecution's examples impermissibly equated reasonable doubt with tasks or events common to daily life (see, e.g., *People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 841; *People v. Nguyen* (1995) 40 Cal.App.4th 28, 36), and the transcript of the argument is indeed susceptible to defendant's interpretation. But controlling authority holds a defendant "must show that, '[i]n the context of the whole argument and the instructions' [citation], there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner'" and courts "'"do not lightly infer" that the jury drew the most damaging rather

than the least damaging meaning from the prosecutor's statements. [Citation.]'" (*People v. Centeno* (2014) 60 Cal.4th 659, 667.)

Under that standard, the prosecution's examples and associated remarks are better understood as illustrations of how to apply common sense *as one component* of a determination about the existence of reasonable doubt, not as fully defining reasonable doubt itself—in other words, as the prosecution itself put it, as examples of "where your common sense and experience kick in." Thus, while the comments might have been better avoided in such close proximity with a discussion of reasonable doubt, a defense attorney could conclude, consistent with constitutional effective assistance guarantees, that an objection stood a fair chance of being overruled and should not be made for that reason.[9] (*People v. Daveggio and Michaud*, *supra*, 4 Cal.5th at p. 841 ["Defendants cite no case in which a court has concluded that it is reversible error to mention reliance on 'common sense and reason' in reaching a verdict, and we are aware of none"].) The possibility of such a reasonable determination by counsel disposes of defendant's ineffective assistance of counsel claim on direct appeal. (*People v. Grimes* (2016) 1 Cal.5th 698, 735 ["'When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation'"].)

---

[9] The trial court delivered its instructions to the jury before the arguments of counsel and accurately described the reasonable doubt standard to require proof that leaves one with an abiding conviction that the criminal charge is true.

Furthermore, defendant has not carried her burden to show there is a reasonable probability the jury would have reached a more favorable verdict if trial counsel had objected to the prosecution's examples and associated remarks. The jury was correctly instructed on the reasonable doubt standard and it was also instructed to disregard any comments by counsel that were contrary to the court's instructions. We presume the jury complied (*People v. Pearson* (2013) 56 Cal.4th 393, 434-435), and this was not a close case.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

RUBIN, P. J.

KIM, J.